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Case Caption

IN THE SUPREME COURT OF THE
UNITED STATES

October Term, 1957

Nos. _____ and _____

Lewis M. Stevens, Successor to Joseph Lawler, as
Secretary of Highways of the Commonwealth of Penn-
sylvania, and George M. Leader, Governor of the
Commonwealth of Pennsylvania,

Appellants

v.

J. K. Creasy, William W. McNamee, Frank Ranallo,
A. W. Tuicillo, Ed Kleetman and R. G. Cumiskey, on
Behalf of Themselves and Other Property Owners and
Lessees Similarly Situated,

Appellees (No. _____)

and _____

Jack C. Marshall and Alice E. Marshall,

Appellees (No. _____)

*On Appeal from the United States District Court for the
Western District of Pennsylvania.*

*Jurisdictional Statement
Opinion Below*

JURISDICTIONAL STATEMENT

Appellants appeal from the final decree of the United States District Court for the Western District of Pennsylvania, entered on March 19, 1958, permanently enjoining them from enforcing or complying with the Pennsylvania Limited Access Highways Act of May 29, 1945, Pamphlet Laws 1108, as amended, 36 Pa. Stat. Ann. §§2391.1 to 2391.15, so as to interfere with or deprive plaintiffs (appellees here) of their right of ingress or egress to, from or across the "Airport Parkway," a public highway in Allegheny County, Pennsylvania, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Western District of Pennsylvania is reported at 160 F. Supp. 404. A copy of the opinion and final decree is attached hereto as Appendix A.

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

These actions were brought under 28 U.S.C. §1331 (and also §1332 in the Marshall case), to have declared unconstitutional as applied to plaintiffs, the Pennsylvania Limited Access Highways Act of May 29, 1945, Pamphlet Laws 1108, as amended, 36 Pa. Stat. Ann. §§2391.1 to 2391.15, and to have defendants (appellants here) enjoined from enforcing said statute as to plaintiffs. A three-judge district court heard and determined the cases in accordance with 28 U.S.C. §§2281 and 2284. The decree of the District Court was dated and entered on March 19, 1958; and notice of appeal was filed in that court on May 9, 1958. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b) and is sustained by *Morey et al. v. Doud*, 354 U. S. 457 (1957), and *Williamson et al. v. Lee Optical of Oklahoma, Inc. et al.*, 348 U. S. 483 (1955).

STATUTE INVOLVED

The statute involved in this case is the Pennsylvania Limited Access Highways Act of 1945. The statute may be found in the 1945 volume of the Pennsylvania Pamphlet Laws at pages 1108 to 1112. It may also be found in Title 36 of Purdon's Pennsylvania Statutes Annotated (Pocket Parts) §§2391.1 to 2391.15. The statute is set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. In an action to enjoin the enforcement of a state statute, may a federal three-judge court predicate its grant of equitable relief on the ground that plaintiffs would incur irreparable loss during the time required to litigate the issue in the state courts, where the highest court of the state already has affirmed the availability of the state courts to hear and determine the issue and already has upheld the constitutionality of the state statute in litigation between the same parties?

2. Where the highest court of Pennsylvania has held that a Pennsylvania statute, which authorizes the limiting of access to a public highway, affords an abutting property owner a means for recovering damages if found constitutionally entitled thereto, may a federal three-judge court, nonetheless, enjoin enforcement of that statute because it independently and subsequently concludes that the owner is constitutionally entitled to damages and that the statute makes no provision therefor?

3. Does the Constitution of the United States require Pennsylvania to compensate an abutting land owner or tenant for his loss of access resulting from the conversion of an unlimited access highway to a limited access highway, where no land is taken?

4. Does a state statute, providing for the limiting of access to a public highway without liability on the part of the state for payment of consequential damages in the absence of a taking of property, deprive an abutting land owner or tenant of his property without due process of law or deny him the equal protection of the laws or impair the obligations of his contracts?

STATEMENT OF THE CASE

On August 1, 1955, and subsequently, plaintiffs filed complaints in the United States District Court for the Western District of Pennsylvania seeking to have the Pennsylvania Limited Access Highways Act of 1945 declared unconstitutional and to enjoin both the Governor and the Secretary of Highways of Pennsylvania from enforcing that Act as to the "Airport Parkway" in Allegheny County, Pennsylvania.¹ At the same time plaintiffs moved for, and were granted ex parte, a temporary restraining order.

In their complaints plaintiffs alleged that they either owned or leased land abutting upon the Airport Parkway, that their existing enjoyment of unlimited access to that highway represented an element of value to the properties (some of them being used or contemplated for use as commercial establishments), and that defendants, acting under the aforesaid statute, were about to declare the road to be "limited access," the effect of which would be to limit ingress and egress to, from or across the highway to points specifically designated by the Secretary of Highways. Such action, it was alleged, would inflict upon plaintiffs losses in excess of the requisite jurisdictional amount.

¹ Since the rights of all appellees are identical, they will be referred to as "plaintiffs." It may be noted, however, that certain of them intervened after the original action was filed and also that plaintiffs Marshall assert diversity of citizenship as an additional ground of jurisdiction. The separate actions were consolidated at an initial stage and proceeded together thereafter.

Plaintiffs' contention was that the limiting of access to the Airport Parkway would deprive them of their property without due process of law and of the equal protection of the laws in violation of the Fourteenth Amendment and would impair the obligations of their contracts in violation of Article I, Section 10, clause 1, of the United States Constitution. These deprivations allegedly would stem from the fact that plaintiffs would not receive compensation from the state for their loss of access because no land was being taken and because the governing statute provided that the Commonwealth would not be liable for consequential damages in the absence of a taking of property.

On March 2, 1956, plaintiffs, at the instance of the District Court, proceeded to file a similar action in a Pennsylvania court of first instance. That court dismissed the complaint on the holding that the Limited Access Highways Act afforded a complete and adequate statutory procedure by which plaintiffs could litigate any claim to damages arising from the limiting of highway access and guaranteed the payment of such damages if plaintiffs were found to be constitutionally entitled thereto. The court's opinion is attached hereto as Appendix C and is reported at 8 Pa. D. & C. 2d 535. This decision was affirmed by the Supreme Court of Pennsylvania, per curiam, with a statement (Appendix D) adopting as its own the opinion of the court of first instance. The appellate decision is reported at 389 Pa. 635, 133 A. 2d 178 (1957). No appeal to this Court was taken.

Following the state court's decision, plaintiffs moved in the District Court (which had stayed proceedings pending determination of the state litigation) for a permanent injunction, and defendants moved for dissolution of the

Statement of the Case

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temporary restraining order and for dismissal of the complaint. All significant facts by that time had been either admitted by the answer or stipulated by the parties. On March 19, 1957, the District Court handed down its decision which permanently enjoined defendants from enforcing as against plaintiffs the Limited Access Highways Act on the ground of its unconstitutionality. The District Court held that it had jurisdiction because there was present a substantial federal question, the requisite jurisdictional amount and, in the *Marshall* case, diversity of citizenship. It decided to exercise this jurisdiction because otherwise plaintiffs "would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts. . . ." (Appendix A; p. 28, *infra*). The court recognized that the limiting of access to highways is a proper subject for exercise of the state's police power. It held, however, that the enjoyment of access to an abutting highway is a property right, that the deprivation of such access constitutes a taking of property for which compensation must constitutionally be paid, that the Pennsylvania statute does not provide for such compensation and that, accordingly, the act is repugnant to the due process clause of the Fourteenth Amendment to the United States Constitution.

THE QUESTIONS ARE SUBSTANTIAL

This appeal raises substantial issues concerning the proper sphere of the federal courts in a proceeding to restrain the action of state officials acting under an allegedly unconstitutional state statute (questions 1 and 2, *supra*) and the reach of the Constitution of the United States as it relates to a state's duty to pay compensation to abutting property owners adversely affected by state action in limiting access to a public highway unaccompanied by any physical appropriation (questions 3 and 4, *supra*). The nationwide significance of the issues thus presented is accentuated by the Federal Aid Highway Act of 1956, as amended, 70 Stat. 374 to 402 (1956), 23 U.S.C.A. §§151 to 175, which provides for access control of roads in the Interstate System of Highways, the cost of which is shared by the federal government and the states.

1. Although recognizing that a federal court should be reluctant to exercise jurisdiction where a plaintiff's constitutional rights will be properly protected in the state courts and where the state statute has not been construed by the state judiciary, the District Court, nevertheless here determined to exercise its jurisdiction. It assigned as its reason that plaintiffs would be irreparably injured during the time necessary to litigate the constitutional issue in the state courts (Appendix A, p. 28, *infra*). In so doing, the District Court, surprisingly enough, fails to note the fact

² 70 Stat. 380, 383, 23 U.S.C.A. §§158(i), 163.

The Questions Are Substantial

that, at its own instance, the constitutionality of this very statute had already been litigated in the aforementioned state court, proceeding between the very parties to this action, with the result that the constitutionality of the legislation had already been upheld by the highest state court. When the parties then returned to the District Court, the sole constitutional issue before that court was whether the statute, in guaranteeing the property owners a means of litigating their claims to damages and of obtaining such damages as they might be constitutionally entitled to receive, comported with the requirements of the Federal Constitution. Consequently, the applicability of the principle invoked to the actual facts may be seriously questioned.

Toomer et al. v. Witsell et al., 334 U.S. 385 (1948), the sole authority cited by the District Court in support of its exercise of discretion, is inapposite. In that case, Georgia fishermen sued to enjoin as unconstitutional the enforcement of several South Carolina statutes governing commercial shrimp fishing. These statutes in part discriminated against non-South Carolina fishermen and imposed a fine of up to \$1,000 and imprisonment of one year for violation. The Court there found that, to comply with the statutes, plaintiffs would be required to pay large sums of money for which no means of recovery was provided, that defiance

The extent of the District Court's action becomes even more difficult to understand if reference is made to the pretrial hearing of February 13, 1956, where in five separate places (pp. 17, 18, 23, 32-a and 33) Circuit Judge Staley said that, if the Pennsylvania statute was interpreted by the state courts so as to provide a remedy by which plaintiffs could test their right to damages in the state courts, the statute was constitutional and the federal court had no further jurisdiction.

bore the risk of heavy fine and long imprisonment,⁴ and that withdrawal from fishing would entail a substantial and noncompensable loss of business. Under these circumstances, this Court upheld the exercise of federal jurisdiction. At the same time, the Court decided against the exercise of jurisdiction with respect to a statute which involved only a question of money and provided a state remedy. It is submitted that the Court's treatment of this last statute is the more applicable to the case at bar.

Moreover, plaintiffs do not here claim that the statute is unconstitutional because it permits Pennsylvania to limit the access on existing highways; the power of the state to do so is not questioned. The sole basis for the claim of unconstitutionality is that the statute allegedly precludes the payment of damages to plaintiffs. Unlike the situation in the *Togmer* case, *supra*, where the fishermen were faced with the choice between giving up their trade or acceding to unconstitutional restrictions, no claim is here made that the state cannot take the contemplated action despite the adverse effect upon abutting owners.

The District Court's fear that the state courts might later find that Creasy has no constitutional and, thus, no statutory right to damages cannot affect the constitutionality of the statute itself. Of course a misinterpretation by the state courts of the Fourteenth Amendment's requirement of compensation would be subject to federal review.

⁴ In contrast, the Pennsylvania statute challenged in the case at bar provides for a fine of only five to twenty-five dollars or one day's imprisonment for each dollar of unpaid fine. This penalty is provided in a section which is no more than a traffic regulation for limited access highways and applies to all persons who use the highways, not just to abutting property owners.

The District Court's opinion fails to appreciate this distinction.

That the District Court erred in reaching over to adjudicate a heretofore unresolved question of Pennsylvania property law is evident from the fact that all federal questions would disappear if the state courts, in the proceeding provided for by the statute, should hold that the enjoyment of highway access is a property right for the limitation of which Pennsylvania law requires compensation to be paid. The Court's action is not justified by *Toomer et al. v. Witsell et al.*, supra, or by any other case known to appellants, and is inimical to the philosophy expressed in *Alabama Public Service Comm'n v. Southern R. Co.*, 341 U.S. 341 (1951), and *Massachusetts State Grange v. Benton*, 272 U.S. 525 (1926).

2. The opinion of the lower Pennsylvania court, Appendix C, infra, adopted by the Pennsylvania Supreme Court in its per curiam order of affirmance, Appendix D, infra, holds (1) that the Pennsylvania Limited Access Highways Act provides for a statutory proceeding whereby a property owner who claims a right to damages may litigate such claim and (2) that in such statutory proceeding he will recover such damages as he is constitutionally entitled to receive. Because it was not within the province of the state courts in the equity proceeding to determine whether a property owner's loss of highway access, unaccompanied by a taking of land, constitutes a constitutionally compensable property deprivation, the Pennsylvania courts properly refrained from deciding this issue. They clearly decided, however, that if such a loss of access is constitutionally compensable, the Pennsylvania statute requires the payment of compensation and provides a

method for determining both the right to and extent of the damages. In effect, the state courts held that the breadth of the statute is measured by the protection of the Constitution, the statutory compensation requirement being as broad as, but no broader than, that of the Constitution itself.

In holding that the Pennsylvania statute does not provide for compensation for what the District Court regarded as the taking of a property right, the District Court has given the statute an interpretation which clearly conflicts with that of the state judiciary. If the limiting of highway access, unaccompanied by an appropriation of land, really does constitute the taking of a property right, then, according to the state courts, the statute guarantees compensation therefor. The contrary decision of the District Court, in effect, overrules the Supreme Court of Pennsylvania in the latter's construction of the state statute. This construction is binding on the federal courts. *Albertson et al. v. Mullard et al.*, 345 U.S. 242, 244 (1953); *Aera Mayflower Transit Co. v. Commissioners et al.*, 332 U.S. 495, 499-500 (1947).

There was, we submit, no occasion for the District Court to determine whether a property owner is entitled to compensation for the deprivation of highway access. Such determination depends upon whether Pennsylvania law recognizes the enjoyment of access as a property right,⁵ an issue which will be answered by the state courts in the statutory proceeding. If, in such proceeding, the Supreme Court of Pennsylvania should hold that the property owners have no constitutional and, thus, no statutory right to

⁵ Cf. *For River Paper Company et al. v. Railroad Commission of Wisconsin*, 274 U.S. 631 (1927).

damages, that decision may then be subjected to federal review. Plaintiffs' rights, whatever they may be, will thus be fully protected.

Furthermore, the District Court erred in its approach to the severability of the act's provisions. After holding unconstitutional the compensation provisions of the statute, which are found in § 8 (Appendix B, *infra*, pp. 48-49), the court, despite the severability clause in § 15 of the act itself (Appendix B, *infra*, p. 51) and the general severability requirement of Pennsylvania's Statutory Construction Act, Act of May 28, 1937, Pamphlet Laws 1019, 46 Pa. Stat. Ann. § 555, proceeded to void the entire statute (Appendix A, *infra*, p. 39). It is submitted that, at most, the District Court should have struck down the provisions which, according to it, forbade the payment of compensation and upheld the rest of the act, including the provisions providing for statutory proceedings to determine damages. In the absence of a determination against severability by the state courts, federal courts should not rush in to void entire state statutes which contain provisions for severability. *Watson et al. v. Buck et al.*, 313 U.S. 387 (1941); *Dorchy v. Kansas*, 264 U.S. 286 (1924).

3. This case, as far as our research discloses, is the first instance in which a federal court has invalidated a state statute designed solely to facilitate the movement of highway traffic. Although the District Court recognized that the state's police power may properly be directed towards the limiting of access to its highways, it erroneously concluded that the abutting owner's enjoyment of access is superior to the public interest in best utilizing highways for the purpose for which they were constructed.

Limitation of highway access under this statute can occur in three ways: (1) simultaneously with the construc-

tion of a new road, (2) to an existing road accompanied by a taking of some land of abutting owners, or (3) to an existing road, without a taking of any abutting land. The present case involves only the third situation.

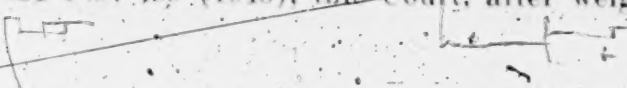
While the constitutions of many states require the payment of compensation where property is damaged or injured, even though not taken, the constitutions of many other states (including Pennsylvania), like that of the United States, require compensation to be paid by the sovereign only where property is taken. Under the United States and Pennsylvania constitutions an abutting land owner's right to compensation for loss of highway access in the third situation thus depends not only on whether the enjoyment of highway access is regarded as a property right but also on whether the restriction thereof is regarded as a "taking" in the constitutional sense. There appears to be no case in Pennsylvania or elsewhere which precisely adjudicates this issue; however, the application of principles well established under analogous facts would dictate here a result favorable to appellants' contention that compensation is not constitutionally required where a public highway is converted from unlimited to limited access without an appropriation of land.

Although the limiting of access to the Airport Parkway might work a hardship upon plaintiffs or lessen the value of their land or impair existing or contemplated uses thereof, the inflicting of such incidental injuries resulting from the proper exercise of state police power does not in and of itself necessitate the payment of damages. *C. B. & Q. Railway Company v. Drainage Commissioners*, 200 U.S. 561, 584, 593 (1906); *New Orleans Public Service, Inc., v. City of New Orleans*, 281 U.S. 682 (1930).

In *Sauer v. City of New York*, 206 U.S. 536 (1907), New York City, pursuant to state authorization, constructed over a public street an iron viaduct resting upon iron columns placed in the roadway. The construction and maintenance of the viaduct impaired plaintiff's access to his property abutting upon the street, as well as his light and air. Plaintiff's claim for damages was rejected, this court holding that, as in the case of a change of grade, an abutting land owner is not entitled under the due process clause of the Fourteenth Amendment to damages for impairment of access to a roadway or of light or air arising from construction or maintenance of public improvements in a street. Thus, on a set of facts closely analogous to that at bar, relief was denied. If the making of a physical improvement in a public thoroughfare does not entitle an adjacent property owner to damages for loss of access, there is, we submit, no reason why the same result should not follow from the enforcement of a state police regulation having the same effect upon highway access.

The issue in *Delaware River Comm'n v. Colburn*, 310 U.S. 419 (1940), as stated by this Court, was "the right of respondents to recover consequential damage to their New Jersey land due to interference with their access to the land and with their light, air and view caused by petitioner's construction of a bridge abutment on adjacent land." The Court resolved this issue against the abutting owners, citing numerous cases, many of them decided in Pennsylvania, which hold that consequential damages may not be recovered where loss of access is inflicted by the erection of structures on public thoroughfares.

Similarly, in *United States v. Wilbur Run Power Co.*, 324 U.S. 499 (1945), this Court, after weighing the com-



peting interests of the public and a riparian land owner, concluded that damages need not be paid where governmental action in lowering the level of a river without a taking of any land adversely affected the capacity of the claimant's power plant. This Court there referred with approval to cases holding that a property owner abutting upon a public highway is not entitled to recover damages for losses resulting from a change in the grade of a highway where no physical appropriation occurs. See to the same effect: *Transportation Co. v. Chicago*, 99 U.S. 635 (1878); *Gibson v. United States*, 166 U.S. 269 (1897). While the foregoing cases involve the erection of physical barriers, the accomplishment of a similar result without an actual erection of barriers should produce no different legal consequence, for it would be a simple matter for the state to erect such barriers in order to limit highway access in the case at bar.

The complexity of the compensation issue can be appreciated by considering the differing effects which the contemplated state action may have upon the various plaintiffs. In some cases, the abutters may be completely landlocked; in others, they may have access to a local service road, the construction of which is authorized by § 3 of the challenged statute; some abutters may enjoy access to other existing roads; and others may have access to points of ingress and egress established by the state under § 1 of the act. The state's liability may vary according to the situation presented. Under such circumstances the District Court should not have rushed in to determine in the abstract these complicated and novel questions.⁶ As we

⁶ The District Court's opinion reflects the confusion of the present Pennsylvania case law. For example, the opinion first cites *Breinig et ux. v. Allegheny County et al.*, 332 Pa. 474, 2 A.

have previously emphasized, the statutory proceeding provides the best means of resolving these issues without thwarting valid action by the Commonwealth or sacrificing the constitutional rights of the plaintiffs.

4. Although appellants believe that deprivation of highway access, unaccompanied by a taking of land, does not constitutionally entitle an abutting property owner to damages, a contrary conclusion would not affect the validity of the Pennsylvania Limited Access Highways Act, Section 8, upon which the District Court based its holdings of unconstitutionality, provides that "The owner or owners of private property affected by the construction or designation of a limited access highway . . . shall be entitled only to damages arising from an actual taking of property," and declares merely that "The Commonwealth shall not be liable for consequential damages where no property is taken." Nothing in this language purports to relieve the state of its constitutional obligation to pay damages where property is taken. Thus, if the District Court is correct in its position that plaintiffs' loss of highway access constitutes a taking of property, this statute on its face requires the payment of damages therefor. Appellants have never argued otherwise. No court has ever decided otherwise.

Furthermore, the denial of consequential damages in the absence of a taking of property infringes upon no constitutional guarantees; this Court has specifically held

2d 842 (1938), to show that the Pennsylvania Courts regard access as a property right and later cites *Soldiers and Sailors Memorial Bridge*, 308 Pa. 487, 162 Atl. 309 (1932), to show that the same courts deny compensation for obstruction of access without a physical appropriation of property.

that compensation for consequential losses is not constitutionally required. *U.S. v. Petty Motor Co.*, 327 U.S. 372, 377-78 (1946); *U. S. ex rel. T.V.A. v. Powelson*, 319 U.S. 266, 281-84 (1943); *Mitchell et al. v. United States*, 267 U.S. 341 (1925). The statute thus does not unconstitutionally restrict the liability of the state.

The District Court refrained from discussing or determining plaintiffs' contentions that the state statute denies them the equal protection of the laws and impairs the obligations of their contracts. We therefore merely note that neither of these constitutional provisions restrict the state in the valid exercise of its police powers. *N.Y. & N.E.R.R. Co. v. Bristol*, 151 U.S. 556 (1894); *East New York Savings Bank v. Hahn*, 326 U.S. 230 (1945); see *Joslin Mfg. Co. v. Providence*, 262 U.S. 668 (1923).

In completely invalidating this statute, the salutary effects of which are undenied, the District Court unprecedently restrained the state in the regulation of its highways—a matter peculiarly of local concern. See *South Carolina State Highway Dept. v. Barnwell Bros.*, 303 U.S. 177 (1938).

It is submitted that the decision of the District Court proceeded upon an exercise of jurisdiction unjustified by the facts and circumstances here present; that it construed the Pennsylvania statute contrary to the interpretation given it by the state courts; that it erroneously found a constitutional right to damages in loss of access to a public highway where no land is taken; and that it mistakenly held unconstitutional a compensation provision which fully comports with the requirements of the United States Constitution.

The Questions Are Substantial

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Appellants believe that the questions presented by this appeal are substantial and that they are of public importance.

Respectfully submitted,

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APPENDIX "A"

IN THE DISTRICT COURT OF THE UNITED
STATES*For the Western District of Pennsylvania*

Civil Action No. 13672

J. K. Creasy, William W. McNamee, Frank Ranallo, A. W. Tuicillo, Ed Kleeman and R. G. Cumisky, on behalf of themselves and other property owners and lessees similarly situated,

Plaintiffs

vs.

Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania,

Defendants

Civil Action No. 13841

Jack C. Marshall and Alice E. Marshall,

Plaintiffs

vs.

Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania,

Defendants

OPINION AND ORDER

OPINION

Marsh, District Judge.

The plaintiffs in these actions before a statutory court¹ seek to have a statute of the Commonwealth of Pennsylvania, Act of 1945, May 29, P. L. 1108, § 1 et seq., as amended, 36 Purdon's Pa. Stat. Ann. § 2391.1 et seq. (hereinafter referred to as "statute"), as applied to them, declared violative of the Constitution of the United States, and to have the defendants, the Governor and Secretary of Highways of the Commonwealth of Pennsylvania, permanently enjoined from enforcing said statute. We think they are so entitled.

Most of the important facts have been stipulated.² The plaintiffs are owners or tenants of land in Allegheny County, Pennsylvania, abutting a public highway known as the "Airport Parkway" (hereinafter referred to as "parkway"), which highway extends from U. S. Routes 22-30, with which it intersects, to the Greater Pittsburgh Airport in said county.

Under the statute, the Secretary of Highways of Pennsylvania, with the approval of the Governor of Pennsylvania, is empowered to take over existing highways in the Commonwealth of Pennsylvania and to declare any such highway a "limited access highway" which is defined by

¹ Convened pursuant to Title 28 U.S.C. §§2281, 2284.

² Stipulation of counsel filed December 19, 1955; defendants' waiver of objections to plaintiffs' findings of fact; see transcript of hearing March 22, 1956, pages 68 et seq.

the statute as a "... public highway to which owners or occupants of abutting property, or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor ...", 36 Purdon's Pa. Stat. Ann. § 2391.1. Section 8 of the statute, 36 Purdon's Pa. Stat. Ann. § 2391.8, provides that "... the owner or owners of private property affected by the ... designation of a limited access highway ... shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken ..."

The defendants admit that were it not for the restraining order and a subsequent preliminary injunction granted by this court, the parkway would have been taken over as a state highway and designated a "limited access highway" under the statute. In that event, which would be the first instance in Pennsylvania where an existing highway has been designated a limited access highway under the statute, all of the plaintiffs will be denied direct access to the parkway from their land. Certain of the plaintiffs will have no means of access on any public highway, and in effect their property will be land-locked and completely inaccessible for most purposes. In declaring the parkway a limited access highway, under the authority of the statute, the Commonwealth would not take any land or improvements presently owned or leased by the plaintiffs.

Plaintiffs assert that § 8 of the statute, under the present decisional law of the Supreme Court of Pennsylvania, denies them compensation for any deprivation of access not accompanied by an actual physical taking of land, and in that event they would be deprived of property

without due process of law as guaranteed them by the Fourteenth Amendment of the United States Constitution.

Initially, the instant proceedings were stayed because we were of the opinion that whether a substantial federal question was involved depended on the construction given the statute, and, further, we were unwilling to resolve that issue until the courts of the Commonwealth of Pennsylvania first had an opportunity to construe the statute in respect to the matter here in controversy.

Accordingly, the plaintiffs filed an action in equity against the defendants in the Court of Common Pleas of Dauphin County, Pennsylvania, requesting relief identical to that sought here.

Upon preliminary objections of the defendants, the Dauphin County Court dismissed the plaintiffs' complaint, holding that under §8 of the statute, the plaintiffs were afforded an adequate remedy at law to test their right to damages, if any, before a board of viewers. It specifically refrained from adjudicating the pivotal issue of whether or not plaintiffs could recover damages in such proceedings. On appeal, the Supreme Court of Pennsylvania affirmed the decision of the lower court.³

Subsequently, the plaintiffs filed a motion here for a permanent injunction enjoining the defendants from enforcing the statute, and on the same date, the defendants moved to dissolve the preliminary injunction and to dismiss the complaint, which matters are presently before the court for decision.

³ *Creasy v. Lawler*, 389 Pa. 635, 133 A.2d 178 (1957), in which the opinion of the Dauphin County Court is quoted verbatim and adopted per curiam.

Some of the plaintiffs have established on their land certain businesses, i.e., service stations, restaurants, and an amusement park. Other properties are presently occupied as residences or farms; but because of the advantage of direct access to the parkway, possess great value as potential commercial sites.

At the time these proceedings were instituted and at the present time, the parkway is the principal thoroughfare for vehicular travel between the City of Pittsburgh, Pennsylvania, and the Greater Pittsburgh Airport, and a vast number of vehicles daily pass the properties of the plaintiffs. The success of all the businesses now in existence and those contemplated by the plaintiffs, or their prospective assigns, depends almost entirely on the continued enjoyment of access to the parkway.

In the past, some of the plaintiffs had been carrying on negotiations to either sell or lease their land for very attractive prices, but the negotiations were broken off by the interested parties because of the publicity connected with the plans of the Commonwealth to designate the parkway a limited access highway.

It is impossible at this time to ascertain with any degree of certainty the extent or degree of damage that would be incurred by the individual plaintiffs because of the deprivation of access involved; however, it would appear from convincing testimony introduced by the plaintiffs that the properties as a whole would depreciate in value in an amount in excess of one million dollars.

The parkway is presently maintained by the County of Allegheny, having been constructed by it in 1949 after it condemned, through the exercise of its power of eminent domain, the necessary quantities of land for the right-of-

way. In some instances, part of the land owned or leased by the plaintiffs was "taken". In accordance with the established law in Pennsylvania, the Board of Viewers when assessing damages to the property owners for their land so taken, diminished the damages to the extent that the abutting properties were enhanced in value because of the benefits obtained by reason of the frontage on the new parkway and the access thereto.

Jurisdiction.

Federal jurisdiction in these cases is based on the plaintiffs' allegation of a substantial federal question, to-wit, that the "Pennsylvania Limited-Access Highway Act" as applied to them is violative of the Fourteenth Amendment of the United States Constitution in that it deprives them of their property without due process of law, and denies them the equal protection of the laws. See *Del. & W. R.R. v. Morristown*, 276 U. S. 182 (1928), at 193, for a discussion of compensation as an element of due process; see also 16A C.J.S. Con. Law §646.

Each of the plaintiffs proved that if the parkway were designated limited-access, he would suffer damages in excess of the requisite jurisdictional amount,⁶ and in the

Cf. *In Re Appointment of Viewers, etc.*, 344 Pa. 5, 23 A. 2d 880, 881 (1942); see also "State Highway Law" of Pa., Act of 1945, June 1, P. L. 1242, Art. 411, §203, 36 Purdon's Pa. Stat. Ann. §670-303, with regard to the present procedure in assessing damages for land taken for state highways.

The defendants contend that the Viewers also considered the possibility of the parkway being subsequently designated a limited access road because the statute was then in effect. The evidence in this respect was not convincing.

The defendants not only do not seriously contend that each plaintiff would suffer damage in excess of \$3,000, the jurisdictional amount, but in effect so stipulated as to the original plaintiffs by advising the court that they had no objection to the plaintiffs'

Marshall case, there is the additional allegation of diversity of citizenship.

Both cases were consolidated for hearing, and as required by 23 U.S.C. §2281 were heard by a three-judge court. The defendants concede that this court has jurisdiction; however, relying on the authority of *City of El Paso et al. v. Texas Cities Gas Co.*, 400 F.2d 501, 503 (5th Cir. 1938), *cert. den.* 306 U. S. 650, *reh. den.* 306 U. S. 669, and *Alabama Public Service Commission et al. v. Southern Railway Co.*, 341 U. S. 341 (1951), contend that we should not exercise our jurisdiction and grant the extraordinary relief requested because of the disinclination of the federal courts to interfere in state matters before remedies afforded by the state have been exhausted, and, especially so, where the State Courts have not yet rendered a clear or definitive decision as to the meaning of the statute.

In *Alabama Public Service Comm. et al. v. Southern Railway Co.*, supra, the Supreme Court of the United States, although assuming it had jurisdiction, refused to exercise it to examine the constitutionality of an order of the Alabama Public Service Commission denying a permit to the plaintiff to discontinue certain intrastate trains on

"Request for Findings of Fact" No. 3 (T. 3/22/56, p. 68), and as to the intervening plaintiffs, the defendants were willing to stipulate if this court had granted the defendants' petition for an injunction they had requested during the proceedings, enjoining certain of the plaintiffs from effecting a change in the local zoning laws or improving their properties pending the outcome of these actions (T. 3/22/56, p. 122).

⁷ See defendants' brief filed November 18, 1955, p. 4; any doubt as to whether the Federal Courts have jurisdiction to determine the constitutional validity of a state statute not yet construed by the State Courts has been dispelled by the Supreme Court of the United States in *Doud v. Hodge*, 350 U. S. 485.

the ground that they were being operated at a loss. The plaintiff under Alabama law had the right prior to instituting the action in the federal court to have the order reviewed by the state courts but chose not to do so. The Supreme Court declined to exercise jurisdiction as a matter of sound equitable discretion because of comity, and because it concluded that the court's intervention was not required to protect the plaintiff's constitutional rights.

Likewise in *City of El Paso et al. v. Texas Cities Gas Co., supra*, the United States Court of Appeals for the Fifth Circuit reversed the granting of a preliminary injunction to enjoin the enforcement of a city ordinance where the plaintiff had not taken an appeal provided by state statute.

We agree that the federal courts should be reluctant to exercise jurisdiction in cases where the plaintiffs' constitutional rights will be properly protected in the state tribunal and where the statute under attack has not yet been construed by the State Courts, and this was our reason in originally staying these proceedings. However, there is another facet to be examined, and that is whether in the process of relegating the plaintiffs to the state tribunals to test the constitutionality of the statute, they will be irreparably harmed. See: *Toomer v. Witsell et al.*, 334 U. S. 385 (1948).

If the defendants proceeded with their plans to make the parkway limited-access, the businesses now established in all likelihood would have to be closed; some of the plaintiffs would not be able to make any practical use of their lands because of the loss of all access to public highways; and those plaintiffs who have conducted negotiations to sell or lease their properties for commercial uses depend-

ent on the continued right of access would be deprived of an opportunity to realize a successful completion of the negotiations.

Hence we are persuaded that were we to refuse to exercise our jurisdiction, the plaintiffs would suffer substantial financial losses during the time it would take to litigate the constitutionality of the statute in the State Courts, which losses could never be recouped if the statute were eventually declared to be unconstitutional. In that event plaintiffs would be irreparably harmed.

Under these circumstances, we believe that the only proper course of conduct is for us to exercise our jurisdiction and determine whether the statute is in fact unconstitutional. Compare *Toomer v. Witsell, supra*, where the court held that equitable relief in enjoining the enforcement of an unconstitutional state statute was appropriate where the plaintiffs would suffer substantial losses in complying with the statute, and where they would be subject to fines and imprisonment for defiance of same. It is of interest to note that the statute in the case at hand provides for imprisonment and fines where any person violates any traffic control established for a limited-access highway by the proper authorities, §9 of the statute, 36 *Purdoh's Pa. Stat. Ann.* §2391.9.

Eminent Domain or Police Power

The plaintiffs contend that if the parkway is declared a limited-access highway by the defendants in accordance with the authority vested in them by the statute, the resultant total destruction of their right of access to the parkway amounts to a "taking" under the Commonwealth's power of eminent domain, thereby imposing a duty on the Commonwealth to pay them compensation.

On the other hand the defendants contend that the statute is a valid and legitimate exercise of the Commonwealth's police power, and even though property rights of the plaintiffs may be destroyed by the application of the statute, there is no duty imposed on the Commonwealth under the Fourteenth Amendment of the Constitution to pay compensation to the plaintiffs.

The power of eminent domain and the police power have been defined and contrasted by the Supreme Court of Pennsylvania in *Appeal of White*, 287 Pa. 259, 134 Atl. 409, 411 (1926), as follows:

" 'Police power' should not be confused with that of eminent domain. Police power controls the use of property by the owner, for the public good, its use otherwise being harmful; while 'eminent domain' and taxation take property for public use. Under eminent domain, compensation is given for property taken, injured, or destroyed, while under the police power no payment is made for a diminution in use, even though it amounts to an actual taking or destruction of property. Under the Fourteenth Amendment, property cannot be taken except by due process of law. Regulation under a proper exercise of the police power is due process, even though a property in whole or in part is taken or destroyed."

See also, *C. B. & Q. Railway v. Drainage Comm'rs.*, 200 U. S. 561 (1906); *New Orleans Public Service v. New Orleans*, 281 U. S. 682 (1930).

Though property may be regulated to a certain extent under the police power, if the regulation goes too far, it will be recognized as a taking. *Penna. Coal Co. v. Mahon*, 260 U. S. 393 (1922).

The ultimate decision as to proper exercise of the police power rests with the courts, and, if the exercise goes too far, there is a judicial duty to investigate and declare the exercise of the police power invalid. *Appeal of White, supra.*

In *Penna. Coal Co. v. Mahon, supra*, at pages 415-416, Justice Holmes, speaking for the court, had the following to say about the police power of the Commonwealth of Pennsylvania unconstitutionally exercised by it under the "Kohler" Act which forbade the mining of coal in such a way as to cause the subsidence of dwellings:

"The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danville & Western Ry. Co.*, 208 U. S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

"... We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change. As we have already said, this is a question of degree—and therefore cannot be disposed of by general propositions."

See also, *Miller v. City of Beaver Falls*, 368 Pa. 189, 82 A. 2d 34, 36 (1951).

The defendants cannot successfully maintain that the plaintiffs would not be deprived of property rights by the change of the parkway into a limited-access highway.

The right of access has been recognized universally as a property right which cannot be taken or materially interfered with without just compensation. 29 C.J.S. Eminent Domain, §105; 18 Am. Jur., Eminent Domain §§158, 183, and cases cited thereunder.

The Pennsylvania courts have also recognized it as a property right. *Breinig et ux. v. Allegheny County et al., Appellants*, 332 Pa. 474, 2 A. 2d 842 (1938); and *Lang v. Smith*, 113 Pa. Super. 559, 173 Atl. 682, 683 (1934), wherein the court said:

"That a man's right of access to his property is a valuable right which cannot be taken away without just compensation has been repeatedly recognized. . . ."

In *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 301-302 (1905), the Supreme Court of the United States, discussing the rights of abutting property owners, stated as follows:

" . . . The right may be regarded in the nature of an incorporeal hereditament. . . . The general doctrine is correctly stated in Dillon on Municipal Corporations: 'For example, an abutting owner's right of access to and from the street, subject only to legitimate public regulation, is as much his property as his right to the soil within his boundary lines. When he is deprived of such right of access, or of any other easement connected with the use and enjoyment of his property, other than by the exercise of legitimate public regulation, he is deprived of his property.' "

We agree that the construction and designation of limited-access highways is a proper subject of police regulation and legislation by the Commonwealth insofar as it relates to the welfare and safety of the public; however, we cannot agree that a total deprivation of the right of access to an existing highway without compensation can be justified as such.

Most authorities on limited-access highways recognize that where an established "land-service" road, as is the parkway presently, in which the normal right of access has already come into being, is converted into a limited-access highway in such a manner that the existing rights of access are destroyed, the owners of such rights are entitled to compensation exactly as they would be if such rights were destroyed by any other type of construction. See: "Abutting owner's right to damages or other relief for loss of access because of limited-access highway or street", 43 A.L.R. 2d 1072, 3, p. 1074; 18 Am. Jur., Eminent Domain §§183, 184, 185 and cases cited thereunder. See also, the following articles: *Clark, The Limited Access Highway*, 27 Wash. L. R. 111, 121 (1952); *Cunningham, The Limited Access Highway from a Lawyer's Viewpoint*, 13 Mo. E. R. 19 (1948); and *Freeways and the Rights of Abutting Owners*, 3 Stanford L. R. 298 (1951). The Supreme Court of Wisconsin in the recent case of *Charles Carrazalla v. State of Wisconsin et al.*, 269 Wis. 593, 71 N.W. 2d 276 (1955), recognizing those articles as authoritative, referred to them as follows:

The authors of all three articles agree that the limiting of access to a public highway through governmental action results from the exercise of the police power, and that in the case of a newly laid out or re-located highway, where no prior right of access existed

on the part of abutting land owners, such abutting land owners are not entitled to compensation. *On the other hand, the authorities cited in these articles hold that where an existing highway is converted into a limited-access highway with a complete blocking of all access from the land of the abutting owner there results the taking of the preexisting easement of access for which compensation must be made through eminent domain . . .*" (emphasis ours)

These articles are also referred to as "instructive discussions" on the subject by the Supreme Court of Missouri in *State v. Cleenger*, 365 Mo. 970, 291 S.W. 2d 57 (1956).

Nor can the defendants successfully maintain that no taking would be involved in the deprivation of plaintiffs' access to the parkway merely because the defendants do not contemplate the destruction or physical appropriation of the plaintiffs' land. *Cf. United States v. Causby*, 328 U. S. 256 (1946); *Gardner v. County of Allegheny*, 382 Pa. 88, 114 A. 2d 491 (1955).

The Supreme Court of Pennsylvania discussed the development of the law with regard to when a "taking" has occurred in *Miller v. City of Beaver Falls*, *supra*, as follows:

The law as to what constitutes a taking has been undergoing a radical change during the last few years. Formerly it was limited to the actual physical appropriation of the property or a divesting of title, but now the rule adopted in many jurisdictions and supported by the better reasoning is that when a person is deprived of any of certain rights in and appurtenant to tangible things, he is to that extent deprived of his property, and his property may be taken, in the constitutional sense, though his title and posses-

sion remain undisturbed; "and it may be laid down as a general proposition, based upon the nature of property itself, that, *whenever the lawful rights of an individual to the possession, use or enjoyment of his land are in any degree abridged or destroyed by reason of the exercise of the power of eminent domain, his property is, pro tanto, taken, and he is entitled to compensation*" . . .

" . . . The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.* We do not propose that our Federal or State Constitution shall be disregarded or nullified either directly or by subterfuge, even though the purposes and objectives of a legislative act are worthy and are sincerely believed to be in the best public interest."

Therefore, we conclude that the proposed deprivation of the plaintiffs' access to the parkway would constitute a taking of property in the constitutional sense under the Commonwealth's power of eminent domain for which compensation must be paid to plaintiffs.

**DOES THE STATUTE CONFORM WITH THE
DUE PROCESS PROVISIONS OF THE FEDERAL
CONSTITUTION INsofar AS IT IS AN EXER-
CISE OF THE COMMONWEALTH'S POWER OF
EMINENT DOMAIN?**

It is an arresting feature in the case at bar that while plaintiffs are most apprehensive that §8 of the statute may

be construed to deny to them compensation for loss of access since none of their land will be taken, the defendants vigorously contend that such was the intention of the Pennsylvania Legislature, and that if plaintiffs are relegated to their remedy at law, the Pennsylvania Supreme Court will so hold. Moreover, the defendants frankly assert that they would also urge this construction of the statute on the Pennsylvania Courts.⁸ Both sides have presented persuasive argument and Pennsylvania decisions to support this interpretation.

But defendants contend that the statute is constitutionally sound because §8 thereof provides plaintiffs with an opportunity to test their right to compensation in the State Courts beginning with a board of viewers.

Plaintiffs contend that we should examine this statute and determine whether or not it provides them with a certain and reasonably prompt right to compensation for loss of access where there is no taking of their land. They argue that if it does not, the statute, *inter alia*, is violative of due process under the Fourteenth Amendment. They earnestly urge upon us that if the statute is unconstitutional, it would be highly inequitable to compel them to pursue a remedy at law in the State Courts, only to have judicially determined that plaintiffs cannot recover compensation under the statute,—the very result which plaintiffs fear and of which defendants are convinced.

Without venturing to predict the ultimate decision of the Pennsylvania Courts on the issue of compensation, we think in these circumstances it is our duty now to examine §8 of the statute, construe it in the light of the pertinent

⁸ Transcript of hearing (11/18/57), p. 41; see also, *id.*, pp. 4, 31, and transcript of hearing (2/12/57), pp. 8-9. >

Pennsylvania Supreme Court decisions, and determining whether as an exercise of the Commonwealth's power of eminent domain, it conforms with the due process requirements of the Fourteenth Amendment with respect to the deprivation of plaintiffs' right of access to the parkway.

We begin with general principles.

"As a general rule, the exercise of the power of eminent domain that is, the taking of private property for public use, is subject to the constitutional right of the owner of the property taken to just compensation, regardless of the manner in which the property is appropriated, or whether it is used for the purposes for which it is taken." 29 C.J.S. Eminent Domain §97; see also, 12 Am. Jur. Constitutional Law §658.

"The constitutional guaranty as to just compensation for property taken for public use is paramount to any statute, and a statute not in keeping with such guaranty is unconstitutional." 29 C.J.S. Eminent Domain §98.

"A statute authorizing an exercise of the power of eminent domain is inoperative and will not support condemnation proceedings unless it provides for certain and reasonably prompt compensation to the owner of the property taken . . ." 29 C.J.S. Eminent Domain §99. (emphasis supplied)

"While the manner in which payment is to be made is ordinarily within the province of legislative discretion, the method of compensation prescribed must be such as to preserve inviolate to the owner absolute assurance of compensation before he is required to surrender possession of his property." 29 C.J.S. Eminent Domain §99. (emphasis supplied)

In §8 it is provided that owners of private property such as plaintiffs "... shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken." If the Legislature meant to identify or equate the term "property" with "land", it seems quite clear that it intended to deprive the plaintiffs of compensation for the loss of the incorporeal property right of ingress or egress to, from or across a limited-access highway.

We have referred to the Pennsylvania Legislative Journal for help in determining precisely what the Pennsylvania Legislature intended when it provided that the Commonwealth would not be liable for consequential damages "where no property is taken" in the designation of an existing highway as a limited-access highway, but we find the journal devoid of all discussion or information in this regard.⁹

Decisions of the Pennsylvania Supreme Court dealing with the liability of the Commonwealth for damages in road cases have denied compensation for damages which occur where there is less than the actual and physical taking of land or ground for the construction or improvement of a highway.

In *Soldiers' and Sailors' Memorial Bridge*, 308 Pa. 487, 162 Atl. 309, 310 (1932), where no land was taken, the Supreme Court of Pennsylvania denied compensation for the impairment of access and deprivation of light sustained by the plaintiff as the result of the erection of a bridge by the Commonwealth in the center and within the

⁹ See Vols. III and IV, Pa. Legislative Journal, 1945.

boundary lines of a street on which the plaintiff's property abutted.

In *Brewer et ux., Appellants v. Commonwealth*, 345 Pa. 144, 27 A. 2d 53 (1942), the Pennsylvania Supreme Court denied a plaintiff whose land abutted a highway compensation for damages sustained as the result of a change of grade where no land belonging to the plaintiff was physically taken.

In *Heil v. Allegheny County*, 330 Pa. 449, 199 Atl. 341 (1938), a state highway on which plaintiff's land abutted was relocated, but since none of the plaintiff's land was taken or seized in the relocation, he was denied damages resulting from the diminution of the value of his land resulting from the diversion of the traffic.

The theory in the earlier decisions was again given support in the case of *Koontz v. Commonwealth*, 364 Pa. 145, 70 A. 2d 308, 309 (1950), where the Supreme Court of Pennsylvania said:

"It is, of course, not open to dispute that, before the Commonwealth can be made to answer, in the present state of the statute law . . . for damages in cases of highway improvement, there must have been a taking of the complaining property owner's land . . ."
(emphasis supplied)

In a more recent decision of the Superior Court of Pennsylvania, *Moyer v. Commonwealth*, 183 Pa. Super. 333, 132 A. 2d 902 (1957), the court specifically held that the impairment of a landowner's ingress and egress to a highway resulting from its relocation 30 feet away, and the building of fill in front of the landowner's property,

without the taking of land, was not compensable under the Pennsylvania "State Highway Law".¹⁰

Interpreting the statute in the light of the foregoing cases,¹¹ we conclude that the Pennsylvania Legislature did not intend to compensate those abutting land owners whose land is not physically taken, but whose right of access to an existing highway is destroyed by the designation of that highway as a limited-access highway.¹² For that reason, we think the statute is repugnant to the due process clause of the Fourteenth Amendment of the Constitution of the United States.

We are especially persuaded to this conclusion by the fact that § 8 of the statute provides that damages for the taking of property for limited-access highways in townships and boroughs, as here, shall be paid in the same manner as now provided by law, to-wit, the "State Highway Law". That law, as construed by *Koontz v. Commonwealth, supra*, and *Moyer v. Commonwealth, supra*, does not impose liability on the Commonwealth for damages where no land is taken.¹³

¹⁰ *Supra*, f.n. 4.

¹¹ It would necessarily follow from the decision in *Doud v. Hodge, supra*, at p. 487, that in the absence of a construction of a state statute by the State Courts, this court may construe the statute in order to determine its federal constitutionality. Cf. *Verluis v. Town of Haskell, Okla.*, 154 F. 2d 935 (10th Cir. 1946); *Virginia Surety Co. v. Knoxville Transit Lines*, 135 F. Supp. 606 (E.D. Tenn. 1955); *Day v. North Am. Rayon Corp.*, 140 Supp. 490 (E.D. Tenn. 1956).

¹² Cf. the Pennsylvania "Statutory Construction Act", 1937, May 28, P. L. 1019, art. I, § 1 et seq., as amended, 46 *Purdon's Pa. Stat. Ann.* § 501 et seq., especially §§ 551, 552(4) with regard to ascertaining the intent of the Legislature in the enactment of a law.

¹³ The federal courts are bound by the interpretation placed by the highest court of a state upon a statute of that state. *Georgia*

Moreover, we have found no other general law of Pennsylvania which, under accepted principles,¹⁴ could be read in conjunction with the present statute so as to make the payment of compensation to the plaintiffs possible.

The defendants submit that even if we hold §8 of the statute to be unconstitutional, the remaining provisions of the Act are valid because the statute contains a "severability clause" (§15, 36 *Purdon's Pa. Stat. Ann.*, §2391.15).¹⁵ However, we think that the remaining provisions of the statute as excised from §8 cannot stand alone when applied to these plaintiffs because there is no method provided therein by which plaintiffs may be compensated for the taking; therefore, we cannot refuse to grant the relief prayed for by the plaintiffs on that account.

Six Per Cent Argument

To bolster their argument that the plaintiffs are not entitled to any compensation from the Commonwealth for the taking of their right of access to the parkway, the defendants advance a further interesting theory to the effect that historically in Pennsylvania the land taken for roads and highways is regarded a little differently than land taken for other public uses because in the original grants

Ry. & Electric Co. v. City of Decatur, 295 U. S. 165 (1934); *Burns Mortgage Co. v. Fried*, 292 U. S. 487 (1934); *Hartford Accident & Indemnity Co. v. Nelson Co.*, 291 U. S. 352 (1934); *United States ex rel. Touhy v. Ragen*, 224 F. 2d 611 (7th Cir. 1955), *cert. den.*, 350 U. S. 984; *McClaskey v. Harbison-Walker Refractories Co.*, 138 F. 2d 493 (3d Cir. 1943).

¹⁴ Cf. *In re Sharret's Road*, 8 Pa. 89 (1848); see also cases cited in 29 C.J.S. *Eminent Domain* §99, fn. 96.

¹⁵ Even if the statute did not contain a severability clause, the Pennsylvania Statutory Construction Act, §55, 46 *Purdon's Pa. Stat. Ann.* §555, which provides for severability generally in any statute would apply.

or patents from the Commonwealth, there were contained reservations to the Commonwealth of 6 acres out of every 100 acres for roads, and the Legislature may so use the land reserved without paying the value of it to the grantee, his heirs or assigns. See: *Plank-Road Company v. Thomas*, 20 Pa. 91, 93. (1852); *Workman v. Millin*, 30 Pa. 362 (1858); *Township of East Union v. Comrey*, 100 Pa. 362 (1882); *Herrington's Petition*, 266 Pa. 88, 109, Atl. 791 (1929). See also, 35 Dick. L. R. 192 (1931) for an interesting historical discussion of this rule.

Though the defendants' argument appears plausible, we cannot subscribe to it as sufficient cause for holding that these plaintiffs are not entitled to any compensation for the taking of their existing right of access to the parkway.

We cannot believe that the original grantors ever envisaged limited-access highways, but rather were concerned equally with the construction of roads for the benefit of the land owners as well as the public using the road. We believe this sentiment is expressed in an early case alluding to the rule, *McClenahan v. Currie*, 3 Yeates (Pa.) 363 (1802), where the court said at pages 372-373:

"Although in this early arrangement, there might be a chance that certain purchasers might be obliged to contribute more than the 6% to the roads, yet it might possibly have been foreseen, that scarce any instance of that would occur, without an equivalent likewise accruing to the purchaser, from the vicinity of such public roads to their buildings and improvements."

The so-called "Six Per Cent Rule", when closely scrutinized, is essentially based on a contractual relation-

ship, the plaintiffs' original predecessors in title having received, in the form of the additional 6 acres, consideration for the right of the Commonwealth to later use the additional acreage for roads. However, we believe that the original agreements did not encompass a situation whereby the original patentees or their privies would be deprived of access to any road so built, and for this reason we can only conclude that the plaintiffs through their predecessors in title have never been compensated in any form for the particular right of which the defendants now seek to deprive them. The point we are developing is that contractually the original patentees, or their privies, the plaintiffs, have never received consideration for their being deprived of access to a road constructed on the reserved acreage.

Although it might be argued that restricting access is actually using "property" for road purposes, the original reservation seems to apply only to land actually used for road construction and to unimproved land, *Plank-Road Co. v. Thomas, supra*, at page 94. These are additional matters taking this present set of facts out of the operation of the rule.

CONCLUSION

For the foregoing reasons we believe the complete deprivation of the plaintiffs' present right of access to the Airport Parkway would constitute a "taking" by the Commonwealth under its power of eminent domain for which the plaintiffs should be compensated in money damages. We do not consider the complete deprivation by law of the right of access as being within the principle of "damnum absque injuria".

Since the "Pennsylvania Limited Access Highway Act" in its present form, as we construe it and as counsel for the defendants argues, denies the plaintiffs compensation for the proposed taking, the defendants should be permanently enjoined from enforcing it over the plaintiffs' protest.

In arriving at this conclusion, we need not consider the further arguments advanced by plaintiffs, namely, that the statute denies them equal protection of the laws because the Pennsylvania Turnpike Act permitting the Pennsylvania Turnpike Authority to take land for the construction of the Turnpike provided for the payment of consequential damages;¹⁶ and that the Commonwealth is estopped from denying damages to the plaintiffs for the destruction of their right of access because when its political subdivision, the County of Allegheny, originally condemned the property in quo, the County obtained a reduction in the damages otherwise payable to the plaintiffs because of the benefits they would derive from the right of access to the parkway after it was constructed. Neither need we consider the plaintiffs' argument with regard to the impairment of obligation of contract.

An appropriate order will be entered permanently enjoining the defendants from enforcing the statute against the plaintiffs.

¹⁶ Also under the proviso in §8 it appears that some abutting property owners may in some circumstances secure compensation for consequential damages while others may not.

FINAL DECREE

This cause having come to be heard on December 2, 1955, February 13, 1956, March 22, 1956, February 12, 1957, and November 18, 1957, before a duly constituted district court of three judges, convened pursuant to Title 28 U.S.C. §§2281, 2284, and all parties being represented by counsel, and the cause, by agreement of all parties, having been submitted upon final hearing, upon the pleadings, stipulations of the parties, oral argument, briefs of counsel for the parties, and the complete record of the proceedings, and this court having duly made its findings of fact and conclusions of law in the opinion filed herewith;

NOW, THEREFORE, IT IS FINALLY DETERMINED, ORDERED, ADJUDGED AND DECREED that the defendants, Lewis M. Stevens, Secretary of Highways of the Commonwealth of Pennsylvania, and George M. Leader, Governor of the Commonwealth of Pennsylvania, be and they hereby are permanently enjoined from enforcing or otherwise complying with the Pennsylvania "Limited-Access Highways Act", 1945, May 29, P. L. 1108, §1, et seq., as amended, 36 Purdon's Pa. Stat. Ann. §2391.1 et seq., so as to interfere with or deprive the plaintiffs of their right of ingress or egress to, from or across the "Airport Parkway" in Allegheny County, Pennsylvania.

(s) AUSTIN L. STALEY,

Circuit Judge

(s) JOHN L. MILLER

District Judge

(s) RABE F. MARSIL

District Judge

March 19, 1958.

APPENDIX "B"

**LIMITED ACCESS HIGHWAYS
AN ACT**

Authorizing the establishment, construction and maintenance of limited access highways and local service highways; and providing for closing certain highways; providing for the taking of private property and for the payment of damages therefor; providing for sharing the costs involved and for the control of traffic thereover; providing penalties, and making an appropriation.

The General Assembly of the Commonwealth of Pennsylvania hereby enacts as follows:

Section 1. For the purposes of this act, a limited access highway is defined as a public highway to which owners or occupants of abutting property or the traveling public have no right of ingress or egress to, from or across such highway, except as may be provided by the authorities responsible therefor. A local service highway is defined as a public highway, either existing, or new, or combination thereof, parallel or approximately parallel to the limited access highway which will provide ingress or egress to or from highways or areas which would otherwise be isolated by the construction or establishment of a limited access highway.

Section 2. (a) The Secretary of Highways, with the approval of the Governor, is hereby authorized to declare

any State highway route, or part thereof, now or hereafter established, to be a limited access highway.

(b) Whenever the establishment of a limited access highway will facilitate the movement of traffic the Secretary of Highways, with the approval of the Governor, is hereby authorized to lay out new highways, take over existing highways, or parts thereof, and declare the same to be a limited access highway to be constructed and maintained as a State highway.

(c) The authorities of any political subdivision of the Commonwealth are hereby authorized to declare any existing or new highway, or part thereof, now or hereafter under their jurisdiction and control, to be a limited access highway and to construct and maintain the same.

(d) The designation of a limited access highway in a city by either the Secretary of Highways or by the commissioners of the county in which the city is located shall be subject to the approval of the city as evidenced by an ordinance duly passed in accordance with the law. Such approval by a city shall in no way impose any liability upon the city for property damages occasioned by the designation of a limited access highway.

Section 3. The Secretary of Highways with the approval of the Governor, or local authorities in connection with the designation or construction of a limited access highway may lay out or construct local service highways. Such local service highways shall be so located as to permit the establishment by private owners or their lessees of adequate fuel and other service facilities for the users of limited access highways. The location of such facilities may be indicated to the users of the limited access high-

ways by appropriate signs, the size and location of which shall be determined by the authorities having jurisdiction. No commercial enterprise or activity shall be located or authorized by the State or by any political subdivision thereof, within or on any public property which is part of the right of way of any limited access highway.

Section 4. In the establishment or construction of limited access highways, the authorities responsible therefor shall have the power to eliminate intersections at grade with other highways by the construction of grade separation structures, by the closing of such intersecting highways at the right of way lines of the limited access highway, or by relocating such intersecting highways as in their discretion will best serve the public interest.

Section 5. Where the Secretary of Highways proceeds under the authority of this act, he shall have authority to construct and maintain any tunnel, bridge, culvert, drainage structure or other structure or appurtenances incidental thereto, other than sanitary sewers, as may be necessary in the construction of the limited access highway: Provided, however, That the Secretary of Highways shall have authority to replace, reconstruct or restore existing sanitary sewers.

Section 6. The establishment of a limited access highway or a local service highway by the Secretary of Highways, as herein provided, shall be by a plan approved by the Governor and filed in the office of the recorder of deeds of the proper county, at the expense of the county. The establishment of a limited access highway or a local service highway by the authorities of any political subdivision of the Commonwealth, as herein provided shall be in the same

manner as now or hereafter provided by law for the opening, widening or relocating of highways by such political subdivision.

Section 7. After the establishment of a limited access highway it shall be unlawful to establish or lay out any new highway intersecting the limited access highway except by and with the consent of the authorities responsible for the limited access highway.

Section 8. For the purpose of constructing limited access highways, local service highways, or intersection streets or roads, the Secretary of Highways is hereby empowered to take property and pay damages therefor as herein provided. In townships such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in townships. In boroughs and cities such property shall be taken and damages paid therefor in the same manner as now or hereafter provided by law for the relocation or widening of State highways in boroughs. The owner or owners of private property affected by the construction or designation of a limited access highway or local service highway or by a change of the width or lines of any intersecting streets or roads shall be entitled only to damages arising from an actual taking of property. The Commonwealth shall not be liable for consequential damages where no property is taken: Provided, however, That the Secretary of Highways shall have authority to enter into agreements for the sharing of the cost of property damages with the officials of any political subdivision of the Commonwealth, which assumes such responsibility by proper resolution or ordinance. The taking of private property and the payment of damages therefor by the au-

thorities of any political subdivision of the Commonwealth shall be in the same manner as now or hereafter provided by law for the relocation or widening of highways by the political subdivision in which such highway is located.

Section 9. The authorities responsible for the maintenance of limited access highways shall have exclusive jurisdiction over the control of the use of such highways, and, by the erection of appropriate signs, may control the ingress and egress of vehicles thereto, therefrom and across, and the parking and speed of vehicles thereon, or may exclude any class or kind of traffic therefrom, and, by the erection of signs or the construction of curbs, painted lines, or other physical separations, provide separate traffic lanes for any class of traffic or type of vehicle: Provided, however, That nothing herein contained shall restrict the authority or jurisdiction of any peace officer as defined in: The Vehicle Code from enforcing such control over traffic or parking as have been or may be established for limited access highways: And provided further, That the provisions of The Vehicle Code not superseded by the provisions of this act shall be and remain in full force and effect for the use and operation of motor vehicles on limited access highways. It shall be unlawful for any person to violate any parking or speed restriction or traffic control established for a limited access highway as provided herein, and any person violating such restriction or control shall, in a summary proceeding, be subject to a fine of not less than five (\$5) dollars nor more than twenty-five (\$25) dollars and costs of prosecution, or imprisonment for one day for each dollar of fine and costs remaining unpaid.

Section 10. Maintenance of a limited access highway shall include the removal of snow, the maintenance of

curbs, shoulders, ditches and slope areas and may include the lighting of the highway or any part thereof and the planting and trimming of trees, grasses, shrubs and vines on the right of way or slope areas.

Section 11. It shall be lawful for any political subdivision of the Commonwealth to make a contribution to the Department of Highways toward the cost of the establishment or improvement of a limited access highway or local service highway by the Department of Highways or toward the cost of maintenance of a limited access highway by the Department of Highways. It shall be lawful for any county and any of its political subdivisions to enter into agreements for the sharing of any or all costs of the establishment or improvement of limited access highways and local service highways.

Section 12. Local service highways constructed under authority of this act shall, upon completion of construction, be maintained by and at the expense of the political subdivision in which they are located.

Section 13. Except as herein provided, the powers granted under the provisions of this act shall not change, alter or diminish any authority or right now or hereafter vested by law in the Secretary of Highways or the officials of any political subdivision of the Commonwealth relating to highways.

Section 14. So much of the money in the Motor License Fund as may be necessary from time to time is hereby specifically appropriated to the Department of Highways for carrying out the provisions of this act. The political subdivisions of the Commonwealth are authorized to provide funds for the establishment, construction or

maintenance of limited access highways or local service highways in the same manner as now or hereafter provided by law for the improvement or maintenance of highways.

Section 15. The provisions of this act are severable, and if any of its provisions shall be held to be unconstitutional by any court of competent jurisdiction, the decision of the court shall not affect or impair any of the remaining provisions of this act.

APPENDIX "C"

SOHN, J., December 17, 1956.—Plaintiffs have filed a class complaint in equity asking this court to decree that the Act of May 29, 1945, P. L. 1108, as amended, 36 PS §2391.1, et seq., contravenes and violates the Constitution of Pennsylvania and the Constitution of the United States. The act in question is the one more familiarly known as The Limited Access Highway Act. Plaintiffs further request that we restrain the Governor of the Commonwealth of Pennsylvania and the Secretary of Highways of the Commonwealth of Pennsylvania from declaring the highway extending from the intersection of Routes 22 and 30 to the Greater Pittsburgh Airport in Allegheny County, Pa. known as the "Airport Parkway" to be a limited access highway and from interfering with direct ingress and egress between plaintiffs' property and the said highway, pending hearing of the issue. They also ask that defendants be forever enjoined from said declaration and said interference.

Defendants have filed preliminary objections to plaintiffs' complaint in equity. Specifically, those objections are: (1) The complaint fails to state a cause of action; (2) plaintiffs have an adequate remedy at law; (3) this court (The Dauphin County Court) is without jurisdiction to grant the relief sought by plaintiffs.

Exhaustive briefs have been filed by counsel on both sides of the case and detailed argument was held before the Dauphin County Court. The greater part of the argu-

ment has been directed to the various constitutional questions raised, and the act itself has been assailed for those reasons. As the complaint indicates, there is at present pending in the United States District Court for the Western District of Pennsylvania an equity suit between the same parties and involving the same issues. That case is listed as Creasy et al. v. Lawler et al., civil action No. 13672. The same relief is asked in this last named case as in the case at bar. The district court has entered a temporary restraining order against the defendants. The suit now before us was instituted because the Federal judges have been unwilling to render a decision until the statute under attack has been first interpreted by the State courts.

Plaintiffs, who claim they are the owners of land and various business properties abutting upon the highway in question, are fearful that their alleged right of ingress and egress will be taken from them without compensating them therefor. They claim that as abutting property owners they have a right of direct access to the presently free-access Airport Parkway, and that this right is a property right which cannot be taken from them without the payment of just compensation. They allege that if their direct access to the Airport Parkway is cut off they will not receive any compensation for the loss of their property.

On the other hand, defendants maintain that plaintiffs are seeking to have the Dauphin County Court, sitting in equity, substitute itself for the board of viewers which is established by the provisions of the very act itself. In effect, plaintiffs ask this court to determine whether or not a taking of property has occurred and what damages shall be awarded therefor, and that, if the depriving them of access is found to be a taking of a compensable property.

right, that plaintiffs' legitimate interests will be constitutionally safeguarded by a resort to viewers proceedings and, if necessary, by later appeals to the courts.

We believe that out of the many questions raised in this case there is only one which this court is called upon to decide; namely, Do plaintiffs have an adequate remedy at law by which they may litigate their right to recover from the Commonwealth any and all of the rights which they claim to be theirs if the present Airport Parkway is declared to be a limited access highway? Our answer must be in the affirmative.

Plaintiffs herein do not contest the right of the Commonwealth to exercise its power of eminent domain. This power is so well established that it needs no citation of authority to support it. At all times plaintiffs can rely on the provisions of the Constitution of Pennsylvania, article I, sec. 10, that no private property shall be taken or applied to public use "without just compensation being first made or secured". Neither do plaintiffs seem to question the Commonwealth's right to exercise its power of eminent domain, in that it can cut off an abutting property owner's direct access to a presently existing free-access highway. Plaintiff's main attack here is on the right of the Commonwealth to deny an abutting property owner's direct access from his property to an existing free-access highway *without compensation*. What the property owners here are asking this court to do is to judicially declare that an abutting property owner's direct access to the existing free-access highway is a property right for which compensation is constitutionally required, and later on to assess and award damages for such a taking. This, in a proceeding in equity, we cannot do. All of plaintiffs' rights can

be protected and secured in a proceeding before viewers, as is provided in section 8 of The Limited Access Highway Act of May 29, 1945, P. L. 1108, as amended, 36 PS §2391.8.

The Supreme Court of Pennsylvania has made it indisputably clear that a Pennsylvania court, sitting in equity, has no jurisdiction to determine whether there has been a taking of private property for public use or to assess and award damages for such appropriating. See *Gardner v. Allegheny County*, 382 Pa. 88 (1955), where it is also held that relief is only obtainable by eminent domain proceedings. Here the legislature, in the Limited Access Highways Act, *supra*, has provided a way in which every property owner may have it decided whether he is entitled to compensation and, if so, when, for what, and in what amounts. Where the legislature has provided a way and a remedy, it becomes the exclusive remedy available: *Hastings Appeal*, 374 Pa. 120 (1953); section 13 of the Act of March 21, 1806, P. L. 558, 4 Sm. L. 326, 46 PS §156. For a late case see *Jacobs v. Fetzer*, 381 Pa. 262 (1955).

It is not for this court to determine whether an abutting property owner has a vested property right to direct access to an existing free-access highway. If such a right exists, plaintiffs have a statutory remedy to protect that right. Should the Commonwealth proceed, then *at that time* plaintiffs will have the right to proceed before viewers on the question of their right to damages. In the orderly course of the procedure provided by The Limited Access Highways Act, they will have a right of appeal to the common pleas court and a jury trial, and still later to have their rights adjudicated in the appellate courts. At all times their constitutional rights, whatever they may be, will be guarded and protected.

J

There being a full, complete and adequate remedy at law, of which all plaintiffs can avail themselves, we, therefore, make the following

ORDER

And now, to wit, December 17, 1956, defendants' preliminary objections to the complaint are hereby sustained, and the said complaint is dismissed at plaintiffs' cost.

APPENDIX "D"

Creasy, Appellant v. Lawler, 389 Pa. 635 (1957).

Opinion Per Curiam, June 28, 1957:

Order affirmed on the opinion of Judge Walter R.
Sohn, reported in 8 D. & C. 2d 535.